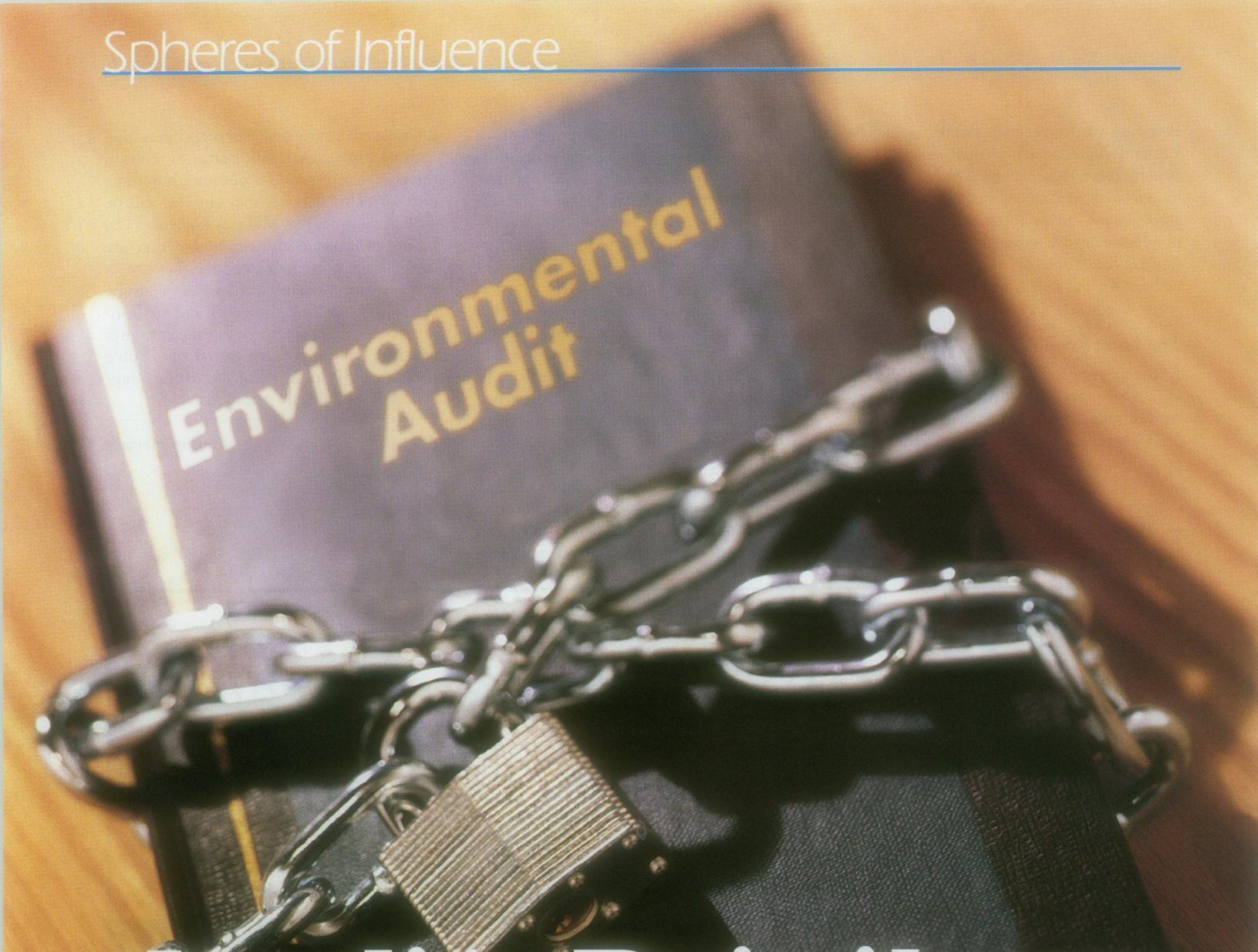

Audit-Privilege Laws: The Right to Know Nothing?

For years, Cincinnati, Ohio, residents who lived near a landfill operated by the nation's largest waste management firm, Waste Management, Inc., complained of odors and suspected that medical problems in their neighborhood might be linked to the landfill. Finally, in 1989, the residents filed suit. Attorney David Altman took the case as plaintiffs' attorney and began to collect company information through the routine legal process known as discovery. Altman says that he found that various documents established a pattern of environment-related events including the migration of gases into the community and alleged violations of federal environmental laws. Furthermore, he says, the information showed that the company was aware of its obligations to implement remedial measures to stop the gas migration but didn't fulfill them.

Then, in 1997, the state of Ohio passed a law that allows companies to keep secret any information that they find as the result of environmental self-audits. Seeking to use the new so-called audit-privilege law to its benefit, Waste Management sought first to withhold the documents in question from court before the new law was officially signed, and then, once the law was officially on the books, to force the plaintiffs to return the documents, claiming that they

resulted from self-audits. The privilege claim was denied by an administrative hearing examiner, and the subsequent federal court action recently resulted in a settlement in which the landfill operator agreed to pay for residents' health examinations.

According to Altman, if Ohio had had its audit-privilege law on the books a few years earlier, the information that led to the settlement would not have been available and the negotiated relief for the residents who live near the landfill would have been much more difficult to achieve. Environmentalists and citizens groups point to the Cincinnati case as a prime instance of the threats to public health that they contend are implicit in audit-privilege laws. That is, if companies can keep secret the information that they gather in their own environmental audits, how are citizens to know of actual or potential environmental threats in their communities?

Industry contends that companies have been unfairly harmed by lawsuits that have used information from self-audits, which would not be available were it not for the companies' initiative to be better environmental managers. Thus, they argue, such good-faith efforts by industry should be rewarded by reasonable immunity and reasonable privilege. Supporters of audit-privilege laws maintain that these laws encourage more audits and more disclosures of regulatory violations because of the greatly reduced chances that audit findings will result in penalties.

The problem with this argument is that it may not be true. A recent study by the National Conference of State Legislatures (NCSL) found no basis for industry's argument that audit laws result in more or better environmental audits. Last year, the NCSL conducted telephone interviews with 988 manufacturing facilities and with environmental regulatory agencies and offices of attorneys general in 28 states in an effort to determine the effects of these laws. What the NCSL found was that the level of audit activity in the states that have audit-privilege or immunity laws was no different from that in the states without them. Furthermore, the NCSL reported, companies in states with the laws were no more likely to disclose violations than companies in states without them.

"What the NCSL study suggests to me," says Nancy K. Stoner, director of the U.S. Environmental Protection Agency's (EPA) Office of Planning and Policy Analysis, "is that the premises underlying those laws are flawed."

A Growing Net of Secrecy

The first state to pass an audit-privilege law was Oregon in 1993, followed closely by Colorado. To Ross Vincent, chair of the Sierra Club National Environmental Quality Strategy Team, the first bills reflected "a very logical and highly predictable response by company lawyers" in answer to several trends.

During the 1980s and the Reagan administration, the concept of the government as enforcer of environmental laws gave way under political pressure to that of government as a more benign regulator. At the same time, some companies striving to comply with the ever-growing complexities of environmental laws and regulations discovered the wisdom of proactive environmental audits in order to preempt potential regulatory violations.

"In the process of doing compliance work with companies, EPA began to find out about these audits," Vincent says. "They acquired them either voluntarily or under duress and used them to evaluate what a company was actually doing. EPA began to realize that there was significant information about enforcement-related activity—compliance issues—that they were finding in these audit reports that was not being captured by [the agency's] reporting requirements."

What the EPA was finding, Vincent says, was that their own reporting requirements were missing violations that were showing up as a result of audit reports. "So in their infinite wisdom, rather than beef up their reporting requirements so that they would begin to capture some of the information that was showing up in the audits but not in their routine reporting," he says, "EPA decided instead to take the voluntary approach and encourage companies to do audits and to fix their violations while doing nothing to improve the mandatory reporting requirements. When that began to happen and the company lawyers got hold of that message, they immediately began raising self-incrimination questions. That was the beginning of the audit-privilege movement."

While industrial observers might agree with Vincent's historical assessment, they would argue that a company's own self-generated audit information deserves legal protection. "Cases have been brought in which a conviction was made easier because of the company's audit report, filed away only for an investigator to find years later, or a large fine was demanded based on the company's self-disclosed violation following an audit," wrote San Diego lawyer Mary L. Walker, who served in the Department of Energy and as an assistant attorney general during the Reagan administration, in an article in *California Manufacturer*. "And then, too," she wrote, "we recognized that the underlying 'facts' in an audit report are not protected, even if the audit is prepared under an attorney's direction." In other words, industry argued, why should "good" companies who report their deficiencies be penalized while "bad" companies who do not report go free?

The argument was compelling, and between 1994 and 1998 there was a flurry of legislative activity around the country as industry-backed audit-privilege bills usually—but not always—won out over those that opposed audit secrecy. But today, with 25 states having adopted audit-privilege and audit-immunity laws, observers on both sides of the issue say such legislative activity has peaked. Following a lively hearing before the House Commerce Committee's Subcommittee on Oversight and Investigations in March 1998 where opponents of audit privileges apparently held the upper hand, Capitol Hill has heard little on the subject this year.

Peeling Back the Covers

Some citizens groups, as well as the EPA, continue to criticize the worst of the audit-privilege laws as measures that provide too deep a refuge in which potential polluters can safely hide with the full backing of the law. Most audit-privilege laws contain two main components: immunity from prosecution for violations that are discovered during an audit and for which the company demonstrates intent to remedy, and privilege—or secrecy—for the audit information.

"The immunity is not so offensive," says Altman. "We don't like immunity in the health and safety community, but at least you know what it is that you're getting immunity for—and what they're getting immunity from is governmental prosecution to one extent or another. The privilege is the problem because the privilege is what authorizes secrecy about the underlying facts about pollution." Individual state laws define the kinds of information that can be considered privileged and the conditions that must be met for immunity.

Audit-privilege laws run counter not only to EPA-administered federal environmental regulations, which require full disclosure of environmental compliance information, but to community right-to-know laws as well. Attorney Sanford Lewis, director of the Good Neighbor Project for Sustainable Industries in Boston, Massachusetts, sarcastically refers to audit-privilege statutes as "right-to-know-nothing laws."

Stoner says that while audit-privilege laws usually exempt from privilege status information that companies are required to report to state environmental agencies (such as the amounts of chemicals they use, release, recycle, and transfer), such laws do interfere with the ability of communities to obtain other kinds of information from neighboring facilities. For example, she says, "Neighbors of a facility may see dark plumes coming out of [a facility] or some kind of unusual discharge into the water and have reason to believe there's a problem, but they and state and local law enforcers will be unable to get access to a whole class of information that may be necessary to determine the cause of the problem, the extent of any environmental harm, and the steps necessary to fix it."

Stoner and Altman contend that "privilege" has long been a narrowly defined legal term that has traditionally been held to a high standard as an exception to general rules of disclosure. "Even executive privilege has been beaten back in favor of disclosure," Altman says. "National security was a blanket at federal facilities for years. It kept secret environmental contamination that we're now spending billions of dollars to deal with because the blanket's been thrown back. Even national security can't be used today to get privilege. And under lawyer–client privilege, you can't hide the facts about pollution." Compared with these other privilege rationales, they argue, the rationale for audit privilege falls well short of meeting that standard.

In assessing audit-privilege laws, Altman is evaluating something he sees as a Machiavellian creation replete with catch-22s. In order to initiate legal action against a potential polluter, plaintiffs must have access to information that is secret from everybody, including government regulators. "In many of these states, [the laws have] created a superprivilege," he says. "[Companies] can correct or not correct what [they] find. They can say, 'By the way, we have this problem, here's how we define it, and we want immunity because we fixed it or made it better.' It doesn't necessarily mean they cleaned it up or took steps to make it better."

Texas's Experience

The Texas Chemical Council, an Austin-based trade organization, lobbied hard for passage of Texas's audit-privilege and immunity statute, which was signed into law in 1995. Jim Woodrick, the current president of the council, contends that industry backs the law because "we have a pretty strong belief that it's important to operate our plant sites in a manner that protects the environment."

Woodrick also says that industry likes the law because it protects them from lawsuits. In order to deal with increasing environmental regulations, companies began conducting their own audits. "But pretty soon we got to the era of litigation and trial lawyers and environmentalists who were looking for ways to basically get at our business, and those reports began to be subpoenaed," he says. "As a result, to use a simple phrase, we began to clam up as an industry because of the liabilities that we were creating for ourselves when we went out and did these audits, which we knew were good things to do. So one of the main reasons we were interested in this kind of legislation is because it is legislation that encourages audits. It encourages improved performance."

The Texas law lays out a series of steps that auditors must take in order to achieve immunity. "Basically," says Paul Sarahan, litigation director for the Texas Natural Resources Conservation Commission (TNRCC), "you've got to tell us that you're going to do the audit, then you do the audit and discover what violations are out there, make a disclosure to us about those violations that you're going to claim immunity for, and then give us the corrective action that you're going to take and the timetable that that's going to be done in. Then when you do all the corrective action we review it and, assuming everything's okay, we send you a letter and tell you that you are immune from penalty for those violations."

While immunity depends on satisfying a series of criteria, privilege is assumed in the law. "[Privilege] provides the means by which a facility can feel secure in doing a thorough and critical analysis of their compliance without worrying about citizens groups and everybody else coming and getting that information," says Scottie Aplin, the TNRCC's audit coordinator.

While Woodrick says he's sure that more chemical manufacturers are doing audits because of the law, Aplin says it's hard to say because there's no baseline for measurement. "Nobody tracks the number of audits," he says, "so to say that we have more audits as a result of this statute is a little difficult. By the same token, it's extremely difficult, I think, to say that the law has not had an effect. I think that aside from trying to encourage audits—and most of us here believe that the program does encourage that—it also provides for immediate resolution of violations, which under normal circumstances you may not have because many facilities will choose never to disclose a violation and never work with the agency to resolve that violation as a result."

"Many of the violations that are being disclosed are ones that wouldn't necessarily be discovered in a standard inspection," Woodrick adds. "That's an additional benefit of the program: getting people to analyze their facility. They're the ones who know it best because they're the ones who are there 24 hours a day. [The possibility of immunity] gives them an incentive to disclose as many of the violations as possible and correct those violations as quickly as possible."

Keeping Secrets in the Future

Both supporters and opponents of audit-privilege laws agree that the issue has cooled in the last year, possibly because, for the most part, states have weighed in on the issue either for or against. Vincent says that he's not gotten a single call that any legislature is considering such a law. According to the NCSL, no additional states had added audit-privilege laws as of June of this year, and only two did last year.

In some states, however, citizens groups are continuing to oppose existing laws. Specifically, groups in Colorado and Ohio have filed petitions to the EPA contending that because the EPA authorizes state environmental programs that must meet federal minimum standards, and because audit-privilege and immunity laws restrict states' abilities to enforce those standards, the agency should therefore withdraw the authority it has granted to the states. The Colorado petition was filed two years ago, and according to Vincent, signers had held back from pressuring the EPA, hoping that Colorado legislators would see the pitfalls of the state's existing law and allow its fifth-year sunset to occur this past spring.

The legislature, however, voted to keep the law by removing the sunset clause. So Colorado's petition backers are renewing their effort to force the EPA to withdraw its authority. "EPA is very reluctant to withdraw [authority] for those programs [from the states] because then it has to come up with the manpower and the resources to manage them," Vincent says. "We're not anxious to see [environmental] programs withdrawn, but neither are we interested in seeing them undermined. The state of Colorado is playing hardball. They're basically painting EPA as the culprit. . . . At some point, EPA is going to have to fish or cut bait. If they withdraw the state program, there's a chance of congressional backlash that they need to be concerned about. But before that day comes, we hope we can persuade the state to make changes in the law that at least get rid of its most abusive provisions."

The EPA opposes audit-privilege laws as a matter of policy. At the same time,

however, the agency encourages voluntary environmental auditing and other forms of self-policing through its own audit policy, which, instead of granting privilege or immunity for violation disclosures, offers reduced or waived penalties for prompt disclosures and corrective actions. Since its inception in January 1996, the EPA's audit policy has resulted in 485 violation disclosures from 1,906 facilities. According to a report by Steven A. Herman, assistant administrator of the EPA's Office of Enforcement and Compliance Assurance, 199 companies received reduced or waived penalties (many of the remaining cases are still under review).

"We've always viewed [our audit policy] as an alternative approach," Stoner says. "It's one that doesn't have the negative effects that audit-privilege laws have on the public right to know or on the law-enforcement agencies' ability to obtain information on the cause of the violations and the actions necessary to correct them and prevent their recurrence." According to Stoner, the EPA has worked with some states to modify their audit-privilege statutes so that the audit privilege is trumped by the information-gathering authority that a state must have in order to receive federal authorization of an environmental program. For example, she says, "If a state is investigating an oil spill, it can get documents even if they're in something that someone calls an audit report or a self-evaluation so that they can remedy the problem."

According to the EPA, one avenue for legal action against suspected polluters in states with audit-privilege laws is to seek action in federal court. Altman, however, argues that federal judges have the discretion to apply state audit-privilege laws if the matter is a state issue. "There are more and more federal judges now that are inclined to do so," he says.

Besides, he argues, in order to bring an action in any court, a plaintiff must have access to information, possibly the kind of information that would come from an environmental audit and therefore be off-limits for discovery. "The beauty of the secrecy provided by audit-privilege laws," he says, "is that you've got to know what you're looking for before you can seek it."

Richard Dahl